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In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM IRVING WOODFORD, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. 15–20) is not yet officially reported.

JURISDICTION

The decision of the Court of Claims was entered May 8, 1957. On August 7, 1957, an order of Mr. Justice Frankfurter extended the time for filing a petition for a writ of certiorari to and including August 20, 1957, and the petition was filed August 20, 1957. The jurisdiction of this Court is apparently invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to the pay of a Lieutenant Colonel upon his advancement to that rank in the Officer's Reserve Corps, even though he never served on active duty in any rank higher than that of Major.

2. Whether petitioner was improperly separated from active military service while in need of medical treatment.

3. Whether petitioner is entitled to disability retirement pay from the date of his release from active duty at a 75 percent disability rate.

STATUTES INVOLVED

The pertinent statutory provisions are set out in the Appendix, *infra*, pp. 8–10.

STATEMENT

Petitioner is a Lieutenant Colonel in the United States Army Reserve (Pet. 15). He served as an enlisted man in the Arkansas National Guard from June 1, 1921 until August 26, 1940, when he was commissioned as a First Lieutenant in the National Guard (Pet. 16). On January 6, 1941, he received a commission as a First Lieutenant in the Army of the United States (Pet. 16). He served on active duty as a commissioned officer from that date until August 9, 1950, when he was relieved from active duty, not by reason of physical disability (Pet. 16).

The highest rank in which petitioner served on active duty was that of Major (Pet. 16). On July 16, 1947, however, petitioner received an appointment

in the Officer's Reserve Corps, Army of the United States, as a Lieutenant Colonel. This appointment provided (Pet. 16):

> This does not affect your current active duty status and you will not perform the duties of an officer under this appointment until so directed by competent orders.

No orders were ever issued ordering petitioner to duty as a Lieutenant Colonel, and accordingly, he continued to serve on active duty as a Major until his release in 1950 (Pet. 16).

Commencing in 1949, petitioner made a number of complaints to Army medical authorities concerning his health. Repeated hospital examination, however, disclosed only flat feet, from which petitioner had suffered prior to his induction into the service, astigmatism, minor stomach disorders, and moderate hemorrhoids (Pet. 19). Petitioner was scheduled for corrective surgery for the hemorrhoid condition but refused the operation. The Army found that in any event this condition was not incapacitating, and ordered his return to duty (Pet. 19). Petitioner thereupon requested and received a number of hearings before various medical boards, all of which found petitioner fit for duty (R. 30–31). These findings were ultimately approved by the Secretary of the Army (R. 31), and petitioner was released to inactive duty under the provisions of the Officers' Personnel Act of 1947, *infra*, p. 8, not by reason of physical disability (R. 31). His final medical summary lists him fit for duty as of August 4, 1950 (R. 31). On February 13, 1951, petitioner was awarded $24

monthly by the Veterans' Administration for hemorrhoids and residuals of a stomach condition. His claims for flat feet and astigmatism were denied as not service connected (R. 32).

On June 7, 1955, petitioner filed this suit in the Court of Claims, presenting three claims arising from his military service (Pet. 15). On cross motions for summary judgment, the Court of Claims rejected all of petitioner's contentions and awarded judgment for the United States (Pet. 15-20). Petitioner claimed, first, that during the period from October 1, 1949 through October 8, 1950, he received pay of a Major but was actually entitled to the pay of a Lieutenant Colonel, and he sought recovery of the difference (Pet. 15). In rejecting this contention, the Court of Claims pointed out that petitioner's promotion to Lieutenant Colonel expressly stated that it did not affect his current duty status, and that in fact he had never served in a higher grade than that of Major. The court concluded (Pet. 17): "He was paid as a Major and was entitled to nothing further under this claim." Petitioner's second claim was that he was improperly separated from active service while in need of medical treatment, including surgery, and he therefore sought to recover the active duty pay of a Lieutenant Colonel from October 10, 1950, the day after he was relieved from active duty, until he is retired for physical disability. The Court of Claims noted, however, that petitioner's active service was entirely at the pleasure of the President, and that he was honorably separated as a Major under the provisions of Section 515 (d) of the Officers' Personnel Act of 1947, *infra*,

p. 8. The court found that all of the boards before which the petitioner appeared found him physically fit for duty, that his separation as a Major, not by reason of physical disability, was proper, and that it ended his active duty status and his entitlement to active duty pay.

Petitioner claimed, finally, that if he is not found to be entitled to pay as contended in his second claim, he nevertheless should receive disability retirement pay at the rate of 75 percent or more from the date of his release from active duty under the provisions of Section 402 (b) of the Career Compensation Act of 1949, *infra*, pp. 9–10. The Court of claims pointed out, however, that the benefits of this Section are expressly predicated upon a determination of disability by the Secretary concerned, and that the Secretary of the Army here had clearly found petitioner fit for duty. The court held that the consistent findings as to petitioner's fitness by the Army medical boards, as confirmed by the Secretary, were not arbitrary and were in accordance with law (Pet. 18–20), and were not reviewable on the merits in a judicial proceeding. The court concluded (Pet. 19):

> * * * Thus it all adds up to this—plaintiff is asking this court to find that he was not fit for active duty. This court has many times held that it cannot undertake to determine who is fit or unfit to serve in the military forces.

ARGUMENT

Petitioner's contentions were carefully examined by the Court of Claims and found to be totally without merit. The decision below was clearly correct, and

there is no basis for further review of petitioner's claims by this Court.

1. There is no substance to petitioner's claim that for a period of time he was entitled to the pay of a Lieutenant Colonel rather than that of a Major. The only statutory authority which he cites in support of this claim, the Career Compensation Act of 1949, *infra*, pp. 9–10, expressly provides in Section 201 (b) that the pay of commissioned officers is to be determined "by the rank or grade in which serving * * *." Petitioner never served in any rank higher than that of Major, and he received the pay of this rank; he is entitled to nothing further.

2. Equally groundless is petitioner's contention that he was improperly separated from active service while in need of medical treatment. Petitioner's physical fitness was established after repeated hearings before various Army medical boards whose findings were approved by the Army Physical Review Council and ultimately by the Secretary of the Army. As the court below recognized (Pet. 19), this determination of petitioner's fitness is final, and not reviewable in any judicial proceeding. See, *e. g.*, *Beamish* v. *United States*, 130 C. Cls. 767; *Holliday* v. *United States*, 128 C. Cls. 647. On the basis of this determination, petitioner was returned to active duty status and, as a reserve officer serving entirely at the pleasure of the President, was properly separated under the provisions of the Officers' Personnel Act.

3. The final determination by the Secretary of the Army that petitioner was physically fit at the time of his release disposes as well of petitioner's third con-

tention, *i. e.*, that he was entitled to receive disability retirement pay from the date of his release from active duty under the provisions of Section 402 (b) of the Career Compensation Act of 1949, *infra*, pp. 9–10. By the express terms of that statute, disability retirement pay thereunder is predicated upon a determination of disability by the Secretary of the service concerned. Since a contrary determination was made in the present case, petitioner is not entitled to benefits under this statute.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

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SEPTEMBER 1957.

APPENDIX

Section 515 (d) of the Officers' Personnel Act of 1947 (61 Stat. 906, 907, 10 U. S. C. 506d (d)) provides:

> To the extent provided from time to time by appropriations for this purpose, any officer of any Reserve component of the Army of the United States may, with his own consent, be ordered to active Federal duty for such length of time as the President may prescribe and in time of a national emergency expressly declared by Congress may be so ordered without his consent. The President may at any time relieve from active duty any Reserve officer who is serving on active duty. Any officer of any Reserve component ordered into or serving on active duty may, with his own consent, be temporarily appointed in a grade in the Army of the United States, either higher or lower than the grade held by him in such Reserve component, and such temporary appointment shall not affect the appointment and grade held by him in his Reserve component.

Act of June 19, 1948 (62 Stat. 489, 10 U. S. C. 499a) provides:

> *Disabled emergency officers retained in service during treatment.*
>
> Notwithstanding any other provision of law, the President is authorized and directed to retain in service disabled officers, warrant officers, and flight officers of the Army and the Air Force of the United States until their treatment for physical reconstruction has reached a point where they will not be further benefited by retention in a military hospital or in the military service.

Section 201 (b) of the Career Compensation Act of 1949 (63 Stat. 806, 37 U. S. C. 232 (b)) provides:

> For basic pay purposes, commissioned officers are hereby assigned by the rank or grade in which serving, whether under temporary or permanent appointment, to the various pay grades prescribed for commissioned officers by subsection (a) of this section, as follows: * * *

Section 402 (b) of the Career Compensation Act of 1949 (63 Stat. 817, 37 U. S. C. 272 (b)) provides:

> Upon a determination by the Secretary concerned (1) that a member of a Regular component of the uniformed services entitled to receive basic pay, or a member of a Reserve component of the uniformed services entitled to receive basic pay who has been called or ordered to extended active duty for a period in excess of thirty days, is unfit to perform the duties of his office, rank, grade, or rating, by reason of physical disability incurred while entitled to receive basic pay; (2) that such disability is not due to the intentional misconduct or willful neglect of such member and that such disability was not incurred during a period of unauthorized absence of such member; (3) that such disability is 30 per centum or more in accordance with the standard schedule of rating disabilities in current use by the Veterans' Administration; (4) that such member has completed at least eight years of active service as defined in section 282 of this title; and (5) that accepted medical principles indicate that such disability may be of a permanent nature, the name of such member shall be placed upon the temporary disability retired list of his service by the Secretary concerned and such members shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided*, That, if condition (5) above is not by a finding that

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such disability is of a permanent nature, such member may be retired by the Secretary concerned and, upon retirement, shall be entitled to receive disability retirement pay as prescribed in subsection (d) of this section: *Provided further*, That if condition (3) above is not met because the disability is determined to be less than 30 per centum, the member concerned shall not be eligible for any disability retirement provided in this section, but may be separated for physical disability from the service concerned and upon separation shall be entitled to receive disability severance pay as prescribed in section 273 of this title: *And provided further*, That regardless of the percentage of disability determined to have been incurred, if condition (4) above is not met because the member concerned has completed less than eight years of active service as defined in section 282 of this title at the time he would otherwise have been retired pursuant to this subsection, the member concerned shall not be eligible for any disability retirement provided in this section, but may be separated for physical disability from the service concerned and upon separation shall be entitled to receive disability severance pay as prescribed in section 273 of this title.

Section 414 (a) of the Career Compensation Act of 1949 (63 Stat. 825; 37 U. S. C. 284 (a)) provides:

SECTION 414 (a). All duties, powers, and functions incident to the determination of fitness for active service, percentage of disability at the time of separation from active service, and suitability for reentry into active service and entitlement to and payment of disability severance pay shall be vested in the Secretary concerned.